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IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

**WILLIAM P. BARR, Attorney General of the
United States, et al.,
*Petitioners,***

vs.

**JENNY LISETTE FLORES, et al.,
*Respondents.***

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

**BRIEF FOR AMICUS CURIAE
AMNESTY INTERNATIONAL U.S.A.
IN SUPPORT OF RESPONDENTS**

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INTEREST OF AMICUS CURIAE

Pursuant to Rule 36 of the Rules of this Court, Amnesty International USA respectfully submits this brief as *amicus curiae* in support of Respondents Jenny Lisette Flores, *et al.*¹

Amnesty International USA ("AIUSA") is one of over forty national sections of Amnesty International ("AI"), a world-wide movement that works impartially for the release of prisoners of conscience,² for fair and prompt trials for all political prisoners, and for an end to the use of torture and all other conduct that is cruel, degrading, or inhuman.

AI's mandate is based upon the Universal Declaration of Human Rights, GA Res. 217A, U.N.Doc.A/810 (1948) and upon other international legal standards for the protection of human rights. AI is independent of any government or regime, political ideology or grouping, economic interest, or religious belief. AI asks all governments to comply without discrimination with international standards to protect human rights. In furtherance of its mandate, AI's International Secretariat, based in London, collects and reviews information on human rights conditions throughout the world, and disseminates this information

to international organizations, governments and the public at large.³

Because AI opposes the forcible return of any person to a country where he or she may be imprisoned or otherwise persecuted as a "prisoner of conscience," AI works to ensure that all governments observe the principle of non-refoulement expressed in the U.N. Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S.150 ("the Convention") and incorporated in the U.N. Protocol Relating to the Status of Refugees, January 31, 1967, 19 U.S.T 6223, 606 U.N.T.S. 268 ("the Protocol"). AIUSA welcomed initiatives to amend the Immigration and Nationality Act ("INA") (8 U.S.C. §§ 1101-1153 in order to bring the United States into compliance with its international obligations under the Protocol, and testified in the hearings preceding the enactment of the Refugee Act of 1980, Pub.L. No.96-212, 94 Stat. 102. AIUSA has provided information about human rights conditions and international human rights standards to various organizations involved in the refugee and asylum process. In its 1990 Report, AIUSA documented some concerns about the implementation of U.S. Refugee policy.⁴ These concerns included the apparent bias against asylum seekers from Guatemala, El Salvador and Haiti, and the use of restrictive detention or interdiction

¹ The Petitioner and Respondent have consented to the submission of this brief.

² AI defines prisoners of conscience as those persons who are detained on the basis of their race, color, religion, ethnic origin, language, sex, or political beliefs, provided that they have neither used nor advocated violence.

³ AI has formal consultative status or similar formal relations with the United Nations, UNESCO, the Organization of American States, the Council of Europe, and the Organization of African Unity.

⁴ AIUSA, Reasonable Fear: Human Rights and United States Refugee Policy (1990).

practices to deter the presentation or pursuit of asylum claims.⁵

AIUSA recognizes that in some exceptional circumstances detention of asylum seekers may be necessary, but opposes detention that is discriminatory or used to deter asylum seekers or in any way infringes the right to a fair determination of refugee status. AIUSA strongly opposes all detention of refugee children unless required by exceptional circumstances.⁶

SUMMARY OF ARGUMENT

The regulations at issue in this case, promulgated under 8 U.S.C. § 1252(a)(1), apply to the detention of children apprehended by the INS and placed in deportation proceedings. Prior to any determination of their immigration status in deportation hearings, children who are otherwise eligible for release are detained rather than released to an unrelated responsible adult, if they cannot be released to a parent, adult relative or legal guardian. AIUSA respectfully urges this Court to affirm

⁵ The respondent class in the instant case includes many children who are nationals of Central American countries, including El Salvador and Guatemala. In recent years, AI has issued numerous reports on human rights conditions in these and other Central American countries and has also made numerous public and diplomatic appeals concerning the serious violations of human rights. AI's reports demonstrate that children as well as adults are at risk of human rights violations.

⁶ AIUSA, Reasonable Fear, supra, note 4, p. 27.

the Ninth Circuit's en banc decision that the INS regulations are unconstitutional.⁷

As the law of the land, international treaties and norms of customary international law are relevant to the construction of constitutional and statutory provisions. Because the regulations apply not to deportable children but to those awaiting determination of their status, they necessarily encompass a group who may be entitled to special protection as refugees. Congress amended the INA with the express purpose of bringing U.S. law into compliance with its treaty obligations as a signatory to the Protocol and incorporated international treaty standards into the INA through the Refugee Act of 1980. Accordingly, this Court should consider these international legal standards in its determination of the constitutional interests at stake. Furthermore, under long-established canons of construction, treaty provisions and customary norms inform the interpretation of constitutional as well as statutory law even when not directly incorporated into a domestic statute, as in the case of the Protocol and the Refugee Act of 1980. Thus other treaties and customary norms are significant sources of positive law that guide the interpretation of constitutional rights.

The Court of Appeal's decision is entirely consistent with international human rights instruments for the protection of children and refugees and gives effect

⁷ Flores v. Meese, 942 F.2d 1352 (9th Cir. 1991), cert. granted sub. nom. Barr v. Flores, 112 S.Ct. 1261 (1992) ("Flores").

to this country's international obligations under the Protocol and the International Covenant on Civil and Political Rights. International law supports the Court of Appeal's conclusion that under the Fifth Amendment's Due Process Clause, the refugee children subject to the INS regulations have a substantial liberty interest in freedom from government confinement that is not diminished by their status as minors or aliens. International law also supports the conclusion that there is no significant government interest outweighing the liberty interest at stake, and that the regulations cannot be justified as rationally related to the government's stated interest in securing the welfare of minors.

ARGUMENT

INTERNATIONAL LEGAL STANDARDS SUPPORT THE CONCLUSION THAT THE INS'S DETENTION POLICY UNCONSTITUTIONALLY DEPRIVES UNACCOMPANIED ALIEN CHILDREN IN DEPORTATION HEARINGS OF DUE PROCESS RIGHTS GUARANTEED BY THE FIFTH AMENDMENT

A. The Due Process Provisions of the Constitution Should Be Informed By Treaty Provisions and Customary International Law

In considering the reach of the due process protections guaranteed by the Fifth Amendment, it is appropriate for this Court to consider the United States' obligations under international human rights law.⁸ The

* International law, which comprises both treaties and customary international law, is part of the law of the United States. Whereas treaties create specific legal obligations only on those states that ratify or accede to them, customary international law is binding on all states.

The United States has ratified, and is therefore legally bound by, two international human rights treaties relevant to this case: the United Nations Protocol Relating to the Status of Refugees, 19 U.S.T. 6223, 606 U.N.T.S. 268 ("the "Protocol"), which the U.S. ratified in 1968, and the International Covenant on Civil and Political Rights, Dec. 16, 1966, GA res. 2200A (XXI), 21 UN GAOR, Supp. (No. 16) at 52, UN Doc. A/6316 (1966) *entered into* (continued...)

Supreme Court has long held that statutes, wherever possible, must be interpreted consistently with international law. Weinberger v. Rossi, 456 U.S. 25, 32 (1982) (quoting Murray v. The Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804)). This interpretative approach not only ensures that the United States will not inadvertently run afoul of its international law obligations, but also provides an additional authoritative source of law to which courts can turn in resolving cases where domestic law is not settled. In determining whether government action violates constitutionally protected rights, international human rights provisions may be used to interpret due process protections. See, e.g., Plyler v. Doe, 457 U.S. 202 (1982) (referring to international legal standards in applying heightened

⁴(...continued)

force Mar. 23, 1976 ("ICCPR"), which the U.S. ratified on June 1, 1992.

In ascertaining the existence of a customary norm of international law, a court must consider whether a practice has ripened into a "settled rule of international law" by "the general assent of civilized nations." Filartiga v. Pena-Irala, 630 F.2d 876, 881 (2d Cir. 1980) citing The Paquete Habana, 175 U.S. at 694. In making this determination, courts can look to a number of sources: judicial decisions recognizing and enforcing the norm, and the works of scholars and jurists. See United States v. Smith, 18 U.S. (5 Wheat.) 153, 160-161 (1820); Filartiga, supra. They can also look to treaties and other international agreements that are intended for adherence by states generally and are in fact widely accepted. Restatement (Third) Foreign Relations Law of the United States, Section 102 (1987).

scrutiny to constitutional review of Texas statute denying free public education to illegal alien children).

B. **The Government's Indefinite Detention Of Alleged Alien Children Who Could Be Released To Non-Relatives Is Inconsistent With International Law**

Since World War II, the United Nations and regional intergovernmental bodies have promulgated an array of multilateral treaties, declarations, and resolutions concerning fundamental human rights, many of which have now ripened into customary norms of international law. Restatement, supra, Section 702. See also, Lillich and Newman, International Human Rights: Problems of Law and Policy, p. 67 (1979).

International human rights standards prohibit arbitrary arrest or detention, and require that all people deprived of their liberty be brought promptly before a judge. Article 9(1) of the ICCPR provides that "no one shall be subjected to arbitrary arrest or detention." Article 9(4) states that "anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that the court may decide without delay on the lawfulness of his detention. . ." Principle 11.1 of the United Nations Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment⁴ ("U.N. Body of

⁴ The U.N. Body of Principles is a set of internationally recognized standards adopted by consensus by the U.N. General Assembly on December 9, 1988.

Principles") states that "a person shall not be kept in detention without being given an opportunity to be heard properly by a judicial or other authority "with the strongest possible guarantees of competence, impartiality and independence."

International standards also require prompt notification of the arrest and the whereabouts of detainees to families or friends. Principle 16.1 of the U.N. Body of Principles states that a person who is detained is entitled to promptly notify members of his family or other appropriate individuals of his detention. In cases involving arrest or detention of juveniles Principle 16.2 requires automatic notification by the authorities themselves to parents or guardians.

Numerous international instruments have recognized the special care and protection due to children, including the Universal Declaration of Human Rights, *adopted* Dec. 10, 1948, GA Res. 217A (III), UN Doc. A/810, at 71 (1948) (Article 25); the Declaration of the Rights of the Child, adopted by the United Nations in 1959, 14 U.N. GAOR Supp. (No. 16), U.N. Doc. A/4059 (1959); the International Covenant on Civil and Political Rights ("ICCPR"), Dec. 16, 1966, GA Res. 2200A (XXI), 21 UN GAOR, Supp. (No. 16) at 52, UN Doc. A/6316 (1966) *entered into force* Mar. 23, 1976, (Articles 2.1, 9.4, 10, and 24); the International Covenant on Economic Social and Cultural Rights, Dec. 16, 1966, GA Res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 49, UN Doc. A/6316 (1966) *entered into force* Jan. 3, 1976 (Article 10); and the Convention on the Rights of

the Child (the "Children's Convention"), U.N. G.A. Doc. A/44/736 (1989).

The Children's Convention, adopted by the United Nations General Assembly on November 20, 1989¹⁰, and other international instruments, state and federal practices, judicial decisions, and scholarly works provide persuasive evidence of an international norm recognizing the special protections owed to children.¹¹ The Children's Convention, for example, requires that in all actions concerning children the best interests of the child shall be a primary consideration. *Id.* Article 3.

With regard to the detention of children, Article 37(b) states unequivocally that:

No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be used only as a measure of last resort and for the shortest appropriate period of time. (Emphasis added.)

Article 37(d) further requires that:

Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to

¹⁰ The United States has signed but has not ratified this Convention.

¹¹ Children are defined in Article 1 of the Children's Convention as those under 18, unless the law applicable to the child provides for an earlier age of majority.

challenge the legality of his deprivation of his or her liberty before a court or other competent, independent and impartial authority and to a prompt decision on any such action. (Emphasis added.)

With regard to children who are refugees, Article 22.1 of the Convention requires states parties:

To ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties.

Article 22.2 further requires that if no parents or other family members can be found, "the child shall be accorded the same protection as any other child permanently or temporarily deprived of his or her family environment for any reason, as set forth in the present Convention". (Emphasis added.)

The International Covenant on Civil and Political Rights, which the U.S. has ratified and which therefore is a legally binding instrument, also provides special protection for children without regard to their legal status.

Article 2(1) of the ICCPR requires each state party

to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the [ICCPR], without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. (Emphasis added)

Article 10.2.(b) requires special protection for detained children, providing that "accused juvenile persons . . . be separated from adults and brought as speedily as possible for adjudication."

Finally, Article 24.1 provides that:

Every child shall have, without discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the party of his family, society and the State. (Emphasis added.)

The Conventions underscore that children, regardless of their status in deportation proceedings, should be detained pending such proceedings only as a matter of last resort, and then only in accordance with stringent procedural protections.

C. International Legal Standards Disfavor
The Detention Of Refugees.

In 1968, the United States acceded to the United Nations Protocol on Refugees, and thereby agreed to certain binding obligations under international law. Between 1968 and 1980, there were a number of Congressional initiatives to amend the INA so as to bring domestic immigration law into conformity with this country's obligations under the Protocol. These initiatives came to fruition in the Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat 102 (1980) which was enacted for the express purpose of bringing U.S. law into compliance with its international treaty obligations. H. Conf. Rep. No. 96-781, 96th Cong. 2d Sess. (1980), reprinted in 1980 U.S. Code Cong. and Ad. News, 141.

The Refugee Act revised the 1952 Immigration and Nationality Act, 8 U.S.C. § 1101, to ensure that it afforded refugees the rights to which they were entitled under the "international treaty obligations" of the Protocol. S.Exec. Rep. No. 96-256, 96th Cong., 2d Sess. 1980, reprinted in 1980 U.S. Code Cong. and Ad. News 141 144.¹²

¹² The report accompanying the House Judiciary Committee's version of the bill stated, for example, that:

The first part of the new definition essentially conforms to that used under the United Nations Convention and Protocol Relating to the Status of Refugees . . . All

(continued...)

The objective of conforming U.S. refugee law to its international obligations extended to the entire statutory scheme, as this Court noted in INS v. Cardoza-Fonseca, 480 U.S. 421, 436-437 ("[it] is clear from the legislative history . . . and indeed the entire 1980 Act . . . that one of Congress's primary purposes was to bring United States refugee law into conformance with the 1967 . . . Protocol). Since statutes "ought never to be construed to violate the law of nations, if any other possible construction remains," Weinberger v. Rossi, 456 U.S. 25, 32 (1982), quoting Murray v. the Charming Betsy, 6 U.S. (2 Cranch) 64 (1804), regulations promulgated under the INA should be construed to be consistent with the Protocol.

Because the regulations at issue here apply to alien children whose status has not been determined, they encompass within their scope children who may be entitled to protection as refugees.¹³

¹²(...continued)

witnesses before the Committee strongly endorsed the new definition, which will finally bring United States law into conformity with the internationally-accepted definition of the term "refugee" set forth in the 1951 United nations Refugee Convention and the Protocol which our government ratified in 1968.

¹³ As Judge Fletcher noted in her dissent to the majority opinion of the three judge panel in Flores, the INS regulations authorize a policy of blanket detention of

(continued...)

The Refugee Act permits individuals to present a claim for asylum in the United States regardless of whether their entry to this country was legal. 8 U.S.C. § 1158(a). Under the Protocol, the United States must comply with the rule of non-refoulement which prohibits return of refugees to countries where, for reasons of their race, religion, nationality, membership in a particular social group or political opinion they would likely face persecution.

The Handbook on Procedures and Criteria For Determining Refugee Status (the "Handbook") published by the United Nations High Commissioner for Refugees ("UNHCR") makes clear that formal designation of an individual as a refugee is primarily of declaratory not constitutive significance.¹⁴ The Handbook states that:

A person is a refugee within the meaning of the 1951 Convention as soon as he fulfills the criteria contained in the definition. This would necessarily occur prior to the time at which his refugee status is formally determined. Recognition of his refugee status does not therefore make him a refugee but declares him to be one. He does not become a refugee because

¹³(...continued)

children whose only possible offense is their alienage and who may eventually be found to be citizens, legal aliens, or refugees entitled to political asylum.

¹⁴ Although AI's mandate differs from that of the UNHCR, the organization regards UNHCR standards as a guide for determining the fair treatment of asylum seekers.

of recognition, but is recognized because he is a refugee. (Handbook, at para. 28.)

The United States Supreme Court has expressly acknowledged its reliance on the Handbook in interpreting the Refugee Act of 1980. See Cardoza-Fonseca, 480 U.S. at 437.¹⁵

Because an individual's actual refugee status predates its formal determination, those with presumptive status are entitled to non-refoulement protection until they are conclusively determined not to be refugees¹⁶. The rationale for the application of the Protocol's most basic protection to presumptive refugees is that it ensures the right of 'genuine' refugees to non-refoulement. This presumptive application of the Protocol's most basic principles is recognized in countries which have acceded to the Protocol and/or the 1951 Convention.¹⁷ Consequently, procedures for determining eligibility for refugee status should not discourage or obstruct the

¹⁵ Use of the Handbook to interpret the Act is also well-established in other courts. See, e.g., Turcios v. INS, 821 F.2d 1396, 1400 (9th Cir. 1987); Ramirez-Ramos v. INS, 814 F.2d 1394, 1397 (9th Cir. 1987).

¹⁶ See Report of the Arusha Conference, Recommendation on the term "Refugee" and Determination of Refugee Status, Executive Committee of the High Commissioner's Programme (30th Session) U.N. Doc. A/AC. 96/INF. 158 at 9.

¹⁷ See Goodwin-Gill, "The Obligations of States and the Protection Function of the Office of the United Nations High Commissioner for Refugees," Transnational Legal Problems of Refugees (1982) Michigan Yearbook of International Legal Studies 291, at 304.

submission of asylum claims nor impede their proper adjudication. Claims of presumptive refugees must be determined through fair, non-discriminatory procedures.¹⁸ The Handbook sets forth guidelines adopted by the Executive Committee of the UNHCR for procedures to satisfy this basic requirement in light of the particularly vulnerable situation of applicants for refugee status. See Handbook, paras. 190, 195-205.

Because of the vulnerable position of refugees, their detention pending a final determination of status is a disfavored alternative. In a resolution adopted by consensus in 1986, the Office of the UNHCR recommended that detention be avoided whenever possible, because of the hardship it imposes on refugees. UNHCR Exec. Committee Conclusion 44 (1986). The UNHCR's interpretations are entitled to consideration because of its supervisory role under the Convention and Protocol,¹⁹ and because states parties to the instruments

are obliged to cooperate with the UNHCR in the exercise of its functions.²⁰

If refugees in general are in a particularly vulnerable situation, juvenile refugees are even more at risk. For refugee children who have been exposed to the stresses of human rights abuses in their own countries, discovery by the INS "is itself a traumatic circumstance exacerbating symptoms and fears already present." Children of War -- Victims of Conflict and Dislocation, 1990: Hearings Before the Subcommittee on Children, Families, Drugs and Alcoholism, 101st Congress, 2d Sess., U.S. Senate (Testimony of Dr. Adrienne Aron, April 3, 1990).

To protect children who are refugees, the Handbook recommends that when appropriate, an unaccompanied minor should be appointed a guardian with responsibility to promote a decision in the minor's best interests. (Handbook, para 214.) In the absence of an appointed guardian or parent, the authorities must ensure that the interests of juvenile applicants for refugee status are fully safeguarded. *Id.* Thus, as to children who are also presumptive refugees, the international human rights instruments are in accord. Both groups are vulnerable because of their status and both are recognized as deserving special protection. For both

¹⁸ Arusha Conference Report, *supra*, at 12.

¹⁹ The Office of the UNHCR was established by the United Nations General Assembly in 1949. GA Res. 41319, UN Doc. A/1251, at 36 (1949). In 1950, the General Assembly adopted the statute describing the UNHCR's mandate as providing international protection to refugees within the scope of the statute and seeking permanent solutions for the problems of refugees through assistance to government and private organizations. GA let 51428, 5 on GAOR Supp. (No. 20) at 46, UN Doc. A/1775. Article II (1) of the Protocol confirmed the UNHCR's role.

²⁰ Under Article II(1) of the Protocol, contracting states undertake "to cooperate with the office of the United Nations High Commissioner for Refugees in the exercise of its functions and shall in particular facilitate its duty of supervising the application [of the provisions of the Convention and Protocol]."

groups detention imposes a burden that should be avoided unless required by special circumstances.

D. International Human Rights Law Supports The Conclusion That The INS Detention Policy Unconstitutionally Deprives Respondents Of A Substantial Liberty Interest In Freedom From Detention Guaranteed By The Due Process Clause Of The Fifth Amendment

1. The INS Regulations Infringe The Respondents' Due Process Right To Freedom From Government Detention

Although the Ninth Circuit did not rely on international law in finding that the Respondents have a constitutionally protected, fundamental right to physical liberty, international law principles provide additional support for its construction of the due process interests at stake. These principles lend weight to the precedents recognizing "the individual's fundamental right to freedom from restraint" (*see Flores*, 942 F.2d at 1365, Tang, J., concurring) and to the proposition that this protection is in no way diminished in this case by the Respondents' status as minors or aliens. *Flores*, 942 F.2d at 1362.

The district court's order, affirmed by the Court of Appeal, requires children detained by the INS and otherwise eligible for release to a relative or legal guardian to be released to a responsible party if no adult

relative comes forward. This order is consistent with the provisions of international law for the protection of both children and refugees, which in both instances disfavor detention except as a measure of last resort.

The order comports with the provisions of the Children's Convention that children should be detained only as a measure of last resort (Article 37(b)) and that unaccompanied children seeking refugee status, or considered to be refugees under applicable domestic or international law, should be given the same protection as any other child deprived of his family environment (Article 22.2). As the Ninth Circuit (*en banc*) majority explained, state and federal policies concerning the confinement of children recognize "the practical need to avoid institutional detention where less restrictive means are available." *Flores v. Meese*, *supra*, 942 F.2d at 1361 (citing various examples of state and federal policies). The ICCPR also guarantees children the special protection due to them as minors without any discrimination as to legal status (Articles 2(1) and 24.1). The order is also consistent with the UNHCR guidelines for the protection of refugees calling upon states to avoid detention wherever possible because of the hardship it causes and to take measures to protect unaccompanied children by appointing a guardian or otherwise ensuring that their interest as applicants for refugee status are fully safeguarded. (Handbook, para. 214.)

2. Neither The Government's Plenary Power In Matters Of Immigration Nor The INS's Alleged Concern For The Welfare Of Children Is Sufficient To Outweigh The Respondents' Liberty Interest

The federal government's plenary power over matters of immigration is not insulated from constitutional scrutiny. United States v. Mendoza-Lopez, 481 U.S. 828, 837, fn. 14 (1987) (Court rejects argument that due process was inapplicable to a Congressional statute precluding allegedly illegal aliens from challenging the validity of their deportation order in a subsequent criminal proceeding); Hampton v. Mow Sun Wong, 426 U.S. 88, 101 (1976) (federal plenary power over aliens does not permit the government to arbitrarily subject all resident aliens to different substantive rules than those applied to citizens); Carlson v. Landon, 342 U.S. 524, 541-542, reh'g denied, 343 U.S. 988 (1952) (discretion of the Attorney General to deny bail to resident alien communists undergoing deportation hearings is not unlimited).

Further, by accession to the Protocol, the United States agreed to be bound by the obligation of non-refoulement, which necessarily modifies the plenary power to exclude or expel²¹ aliens who are protected by

²¹ While Respondents' detention has arisen in connection with deportation proceedings, the government has recognized that its broad prohibition against release to (continued...)

their status as actual or presumptive refugees. Through its accession to the Protocol, the United States is bound by a "Treaty made . . . under the Authority of the United States," the provisions of which are the "supreme law of the land." U.S. Const. Art. VI, § II. Like all treaties, the Protocol qualifies in some measure the sovereignty of the United States. See The F.S. Wimbledon (1923) P.C.I.J., Ser. A, No. 1, 24, 25.

Whilst arguing that this case requires special judicial deference to a policy choice made pursuant to the political branches' plenary power over immigration, the government ignores the effect of its international treaty obligations. Since the Protocol offers its protection to presumptive refugees until they are conclusively determined to be ineligible for refugee status, the INS must implement the INA in accord with the guarantees afforded refugees under the Protocol as incorporated in the domestic statute. A practice of detention in preference to release does not meet the requirements of the Protocol as interpreted by the UNHCR in his supervisory role. See Section D supra. Not only does the government ignore any questions related to the limitations on its plenary power as a party to the Protocol, it has also apparently prejudged -- and summarily dismissed -- any individual claims to refugee

²¹(...continued)

non-related adults is "not related to the issue of flight risk or the administration of any provision of the immigration laws." Flores, 942 F.2d at 1356.

protection for Central American children arising under the Protocol.²²

The government's sole purported justification²³ for detaining children otherwise eligible for release is "for the purpose of fostering their welfare and safety." (Brief for the Petitioners, p. 26.) Even the most minimal scrutiny reveals the absurdity of this contention.

It is a matter of virtually universal consensus that children should be detained only as a matter of last resort, and that releasing them to any responsible adult is far preferable to detaining them, even under ideal conditions. See, e.g., Institute of Judicial Administration/American Bar Association, Juvenile Justice Standards Relating to Interim Status: The Release, Control and Detention of Accused Juvenile Offenders between Arrest and Disposition (1980); see also, *supra*, Sections B-C. Not surprisingly, therefore, the INS conspicuously fails to provide any evidentiary support for the proposition that the "welfare and safety" of minors is better protected by custodial detention than by release to an unrelated adult. (*Flores*, 942 F.2d at 1370 (Tang, J.,

^a The government defines the problem of unaccompanied minors apprehended by the INS as one "thrust upon the INS by the combination of socioeconomic conditions in Central America beyond its control—which causes huge numbers of alien juveniles to flee their homelands." (Petitioners' Brief at 31.)

^b The government concedes that releasing children to unrelated adults does not adversely affect its interest in ensuring the childrens' appearances at their deportation hearings.

concurring).) Instead, the government favors judicial deference to its regulations because "the decision to detain these aliens has been made by the agency in the Executive Branch responsible for day-to-day implementation of policies with respect to aliens" (Brief for the Petitioners, p. 30) and "in the immigration context, those policy choices are of a political character and therefore subject only to narrow judicial review [citation]." (Brief for the Petitioners, p. 31.)

The government is mixing apples and oranges in attempting to justify its failure to adduce a rational basis for its regulations by relying on its plenary power in the field of immigration, consideration of which is relevant at most, only to the threshold question about the standard of review. It is not the INS' power, but its expertise, which must support any claim, however ill-founded, that deference to the INS obviates the necessity for the government to evidence a rational basis for its regulations.

In light of the general consensus disfavoring the detention of juveniles when other alternatives are available, the government's assertion that the best interests of children are served by detention rather than release is astonishing. The government's professed concern for juveniles seems to be at odds with what one government representative candidly conceded to be the "adverse factors" which could allegedly stem from release to unrelated adults "if every juvenile apprehended is routinely turned over to anyone who claims them, would that (sic) set up a syndrome by which more and more juveniles would come because there would be no

deterrence to coming. They would get exactly what they want." (Joint Appendix, p. 21.) That there is no rational relationship between the policy and the interest of the government in securing the children's welfare is further demonstrated by the INS's failure to do any research or investigation into matters relevant to the welfare of children in deportation proceedings before instituting the regulations prohibiting release to nonrelated adults. (See, Joint Appendix, pp. 9-12, 15.) Without investigating whether a juvenile released to a parent or legal guardian was more or less likely to be harmed than a juvenile released to some other responsible adult, the INS summarily abandoned its prior practice of release to any responsible adult. (Joint Appendix, pp. 15, 20.) That the INS has, on occasion, resorted to detention expressly as a means of deterring possible asylum seekers,²⁴ further undermines the government's claim that the subject regulations are indeed in the best interest of children entitled to seek protection as refugees.

E. The Court Of Appeal's Understanding Of The Procedural Due Process Requirements Is Consistent With Fundamental Principles Of Human Rights Law

In further support of the need for appointment of a guardian to ensure the best interests of an unaccompanied child seeking refugee status, there is wide recognition of the particularly vulnerable situation of children in the asylum process. See e.g. Perez-

²⁴ See, e.g., INS Enhancement Plan For The Southern Border (2/16/89), p. 8.

Funez v. INS, 611 F.Supp. 990, 1002 (C.D. Cal. 1984); M. Olivas, Unaccompanied Refugee Children: Detention, Due Process and Disgrace, Stanford L. and Pol. Rev. Spring, 1990, 159-166. Courts too have recognized that "deportation is a harsh remedy", see Cardoza-Fonseca, and that the immigration laws and procedures are complex, particularly for those seeking refuge. Perez-Funez, 611 F.Supp. at 1002; Lok v. INS, 548 F.2d 37, 38 (2d Cir. 1977) and that those seeking refuge are therefore in a position of extreme vulnerability. Nevertheless, the regulations concerning the conditions for release of unaccompanied minors in deportation proceedings offer children fewer protections than those available in other contexts where their rights are at issue in administrative proceedings.

Since the regulations at issue here were promulgated under an immigration statute amended by the Refugee Act of 1980 to conform those aspects of immigration law relating to refugees to international legal standards, the reasonableness of the regulations should be reviewed in light of those international legal standards.

In construing the Due Process Clause to require additional procedural safeguards for children apprehended by the INS, the Court of Appeal's decision was consistent with international standards appropriate for this Court's consideration.

The district court's order necessitated two changes in procedures established under the immigration regulations. It required an automatic review by an immigration judge of the child's detention instead of

conditioning such review on a request by or on behalf of the detained child; and it required the immigration judge to inquire as to whether any non-relative willing to take temporary custody endangered the child's well-being. In affirming the district court's order, the majority opinion declined to say whether the procedural due process issues should be determined under the standard of Gerstein v. Pugh, 420 U.S. 103 (1975) or Matthews v. Eldridge, 424 U.S. 319 (1976), explaining that the district court's order was proper under either standard. Flores, 942 F.2d at 1364.

In requiring automatic review by an immigration judge of the detention of a child in deportation proceedings, the district court's order gave effect to international principles regarding the right to impartial review of any detention, civil or criminal, and to standards recognizing the greater protection due children on account of their status as minors and disfavoring detention of children except as a measure of last resort. These principles inform the analysis under Matthews v. Eldridge of both the private interest and the risks attendant on its erroneous deprivation. Whether government action must comply with due process depends on whether an individual has a property or liberty interest that courts have considered protected by due process. "Procedural due process imposes constraints on governmental decisions which deprive individuals of "liberty" or "property" interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment." Matthews v. Eldridge. Thus the determination of whether due process is required in a given case first requires a threshold examination of the

interest at stake. See Morrissey v. Brewer, 408 U.S. 471 (1972). As discussed in Section C, supra, international human rights instruments underscore a child's interest to freedom from detention except as a matter of last resort, because of the special protection owed to minors. These principles support the conclusion that the children's private interest is a weighty one, invoking the right to liberty free from government detention, and that the risk of erroneous deprivation of that right has severe consequences for children.

This Court has recognized that children "often lack the experience, perspective and judgment to recognize and avoid choices that would be detrimental to them." Bellotti v. Baird, 443 U.S. 622, 635, reh. denied, 444 U.S. 887 (1979). International human rights law is in accord with this principle and with the Court of Appeal's conclusion that the requirement of automatic review by an immigration judge was reasonable in light of childrens' inferior capability to understand what they are waiving by failing to request a hearing. Flores, 942 F.2d at 1364.

Since the only burden on the government is to provide automatically what it now provides upon request (i.e., a hearing before an immigration judge), the Court of Appeal correctly concluded that the balancing of interests required by Matthews tipped conclusively in favor of the Respondents' right to the procedural due process protection of the additional procedures required by the district court's order.

CONCLUSION

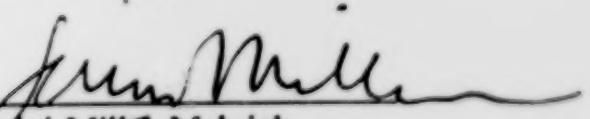
The decision of the Court of Appeal for the Ninth Circuit that the subject INS regulations are unconstitutional under the Due Process Clause of the Fifth Amendment is entirely consistent with international human rights instruments for the protection of children and refugees and gives effect to this country's international obligations under the Protocol and the International Covenant on Civil and Political Rights. Accordingly, AIUSA respectfully urges this Court to affirm the Ninth Circuit's decision.

DATED: June 29, 1991

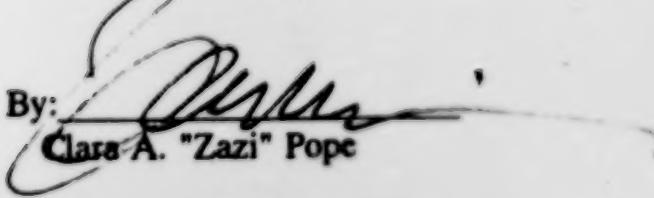
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